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Supreme Court, U.S.
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No. 90-1286
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

JESSIE L. JENKINS, a/k/a CLARENCE DUKE McGann and JOHN FRENCH,

Petitioner

vs.

BARNETT BANK OF PENSACOLA, FLORIDA, C. C. MERTINS, JR., Chairman of the Board,

Respondents

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

DISCLOSURE OF INTERESTED PARTIES 1

STATEMENT OF THE CASE 2

ARGUMENT SUMMARY 9

LEGAL ANALYSIS

POINT I

The Issue Raised is Not Suitable for Review on Writ of Certiorari. 10

CONCLUSION 13

TABLE OF AUTHORITIES

	Page
U.S.Sup.Ct. Rule 10.1	10
Fed.R.Civ.P. 4(c)(2)(C)(ii)	6,7,8
" " 56	7
Bialek v. Racal-Milgo, Inc., 545 F.Supp. 25 (D.C.N.Y.) 1982)	12

DISCLOSURE OF INTERESTED PARTIES

Pursuant to Rule 14.1(b) of this Court's rules, the following information regarding corporate parents and subsidiaries of the respondents is as follows:

Barnett Bank of West Florida is a wholly owned subsidiary of Barnett Banks, Inc.

STATEMENT OF THE CASE

The wallet of New York City resident Jessie J. Jenkins was either lost or stolen in 1981. It had contained a Social Security card. Clarence Duke McGann claims that in 1982 he opened an account in the Barnett Bank of West Florida ("Barnett") in the name of Jessie Jenkins using Jenkins' Social Security card. McGann at all times held himself out to Barnett as Jessie Jenkins. (Appellee's Record 4, 36, 39-41).

After opening this account, McGann was convicted of a crime and incarcerated in a Florida penitentiary. While incarcerated, he closed the bank account, drawing a cashier's check in the amount of $33,648.91 made out to "J. Jenkins" in trust for Alise McGann Lindsey

(50). On the face of the check was the following:

> "NOTICE: THE PURCHASE OF AN INDEMNITY BOND WILL BE REQUIRED BEFORE ANY CASHIER'S CHECK ON THIS BANK WILL BE REPLACED OR REFUNDED IN THE EVENT IT IS LOST OR STOLEN" (36).

McGann endorsed the check with, "For deposit only acct #001840584 of North Side Savings Bank, N.Y. N.Y., Jessie J. Jenkins" and sent it to a bank account in the name of Clarence D. McGann at the North Side bank. According to McGann, North Side forwarded the check to McGann's last known address to obtain his signature. McGann claims he never received the check. It has never been presented for honoring (4,37).

By letter dated November 26, 1985, McGann (using the Jenkins alias) wrote to the Barnett, inquiring about a replacement check. Bank President C. Carl Mertins, Jr. responded:

> "In order for us to reissue the check, we will need an indemnity bond. Enclosed you will find an application, an affidavit of loss and an agreement of indemnity. Would you please have these completed and return them to us with $336.49 for covering the cost of this bond.
>
> When we receive these documents, with your check, we will forward them to Seaboard Surety Company, asking them to issue the bond. After the bond has been issued, we will be able to forward you a replacement check." (39)

McGann filled out the papers, but Seaboard Surety would not approve the bond application. McGann made no other attempt to obtain a bond (51).

The actual Jessie Jenkins informed Barnett on November 14, 1987 that the IRS was assessing penalties against him for his failure to report interest income on an account maintained in Florida which Mr. Jenkins knew nothing about. McGann wrote back to Barnett in October of 1988 seeking a release of the $36,000 without a bond, acknowledging that he had been using an alias

and explaining that he was incarcerated in the Attica Correctional Institute in New York (40-43)[1].

The bank responded:

> "Our files indicate the account opened with our bank in 1982 in the name of Jessie J. Jenkins . . . was not opened by Mr. Jenkins. In view of the apparently false identification used to open the account, we will not issue a replacement check. We will release the funds only pursuant to a valid court order which determines ownership of the funds and protects the bank from conflicting claims to the funds. If a valid claim to the funds is not established by court order, the funds will eventually be turned over to the State of Florida under the Unclaimed Property law." (44).

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[1] McGann also asked Barnett to accept as an alternative to an indemnity bond a security interest in certain property he owned in Florida. There is no indication that he offered the bank any prospectus on this property, that there were no lienholders, or that he was unable to present this option to a bondsperson.

McGann then commenced this breach of contract action in the Western District of New York against Barnett and Mertins. He based this action on the fact that Barnett was requiring him to obtain a court order prior to reissuance of the cashier's check. McGann sent only one copy of the summons and complaint to Barnett, and sent no notice and acknowledgment of service nor a self-addressed postage prepaid envelope. He never attempted to personally serve either defendant. Barnett and Mertins answered on August 4, 1989. (1-12, 25).

On September 26, 1989, Barnett and Mertins moved to dismiss the complaint on the basis of the complete absence of contact by either Barnett or Mertins with the State of New York, McGann's failure to either comply with Fed.R.Civ.P. 4(c)(2)(C)(ii) or personally serve each defendant, and the inability to present any facts which could support a

finding that either Mertins or Barnett was liable in contract or subject to punitive damages. In response, McGann asked the district court to treat Barnett and Mertins' motion as one for summary judgment under Rule 56. (19-30).

By order and decision of United States District Court, Arcara, J., it was determined that McGann failed to comply with Fed.R.Civ.P.4 and there was therefore no personal jurisdiction. On the merits, the court concluded that Barnett and Mertins were entitled to judgment as a matter of law because Jenkins asserted nothing but a breach of contract claim where admittedly the bank was entitled to a bond and McGann could not obtain one (53-58).

McGann appealed, but at no time did he challenge the court's conclusion that (1) there were no material issues of fact in

dispute; (2) there was a complete failure on his part to comply with the procedural requirements of Rule 4; and (3) the bank was under no contractual obligation to release the funds without a bond. The Second Circuit Court of Appeals affirmed the district court's order, agreeing that summary disposition was both procedurally and substantively appropriate. Not only had plaintiff asked that the motion be deemed one for summary judgment, but on the merits there was no basis for granting the relief plaintiff sought. Even assuming, arguendo, that Barnett was attempting to change the terms of the contract, there was no damage because McGann could not satisfy the original terms. He could not sue for breach of a promised performance that had simply not yet become due. McGann's motion for a rehearing was denied on November 21, 1990.

Importantly, both the District Court and the Court of Appeals recognized that Florida had an available remedy for a lost negotiable instrument, and there was nothing inappropriate in Barnett's insistance that McGann avail himself of such relief.

ARGUMENT SUMMARY

Upon McGann's request, the District Court treated the underlying motion as one for summary judgment. In reviewing it as such, the court rightfully concluded that McGann was not entitled to his requested relief. This conclusion was affirmed by the Court of Appeals. As best as can be culled from the pages and pages of McGann's rhetoric, the instant petition appears to be based on the ground that the District Court failed to decide a summary judgment motion in the light most favorable to McGann as the non-moving

party. This is not a valid argument and the petition should not be granted. Even if the events were exactly as McGann alleged, the petitioner could not escape the procedural pitfalls and substantive shortcomings of his claim.

LEGAL ANALYSIS

POINT I

The Issue Raised is Not Suitable for Review on Writ of Certiorari.

A writ of certiorari will be granted only when there are compelling reasons, such as an inter-circuit conflict or a determination deciding an important question of federal law. Here there is neither. Petitioner simply disagrees with the lower courts' conclusion and wishes to have yet another court inform him that his relief lies in another forum. Given the absence of conflict or need for supervision over the District Court or Court of Appeals, the writ should be denied.

U.S.Sup. Ct. Rule 10.1. There is simply no impropriety in the courts' decisions.

First, McGann never satisfied the requisite statutory service method, and does not now claim that he did. Even viewing the facts in a light most favorable to McGann, Barnett and Mertins were never properly brought before the court.

Second, McGann never satisfied New York's long-arm statute. Although Mcgann argued that statutory and due process minimum contacts were satisfied because Barnett mailed a "fraudulent" letter to Attica (a claim that does not comport with the plain language of that November 26th letter nor the intent of the defendants), the act of mailing the letter is simply inadequate under controlling law to subject the Florida bank and Florida resident to New York jurisdiction. It does not amount to "doing business" nor is it a tortious act

committed within the State. See, Bialek v. Racal-Milgo, Inc., 545 F.Supp. 25 (D.C.N.Y. 1982). Accordingly, the matter was appropriately decided and dismissed on jurisdictional defects alone.

Third, any concern McGann may have had about the application of the appropriate standard of review should have been alleviated when the Second Circuit, giving him every benefit of the doubt, considered his claim on the merits. They found that even if the bank's letter did amount to an alteration of the contract, McGann was indisputably never in a position to comply with those original terms because he could not obtain an indemnity bond. Therefore he suffered no damage. The bank was under no contractual obligation to accept another form of security.

CONCLUSION

Every benefit has been extended to the Petitioner in this case. Even given the clear jurisdictional defects, both the trial and appellate courts carefully reviewed the complaint in the light most favorable to McGann and rightfully concluded that he was not entitled to his requested relief. Accordingly, it is respectfully requested that the petition for writ of certiorari be denied.

Dated: March 15, 1991

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